

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Daniel Giansante	Team: Squad #2	CCRB Case #: 201501097	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Monday, 02/09/2015 9:35 PM	Location of Incident: § 87(2)(b)	Precinct: 33	18 Mo. SOL 8/9/2016	EO SOL 8/9/2016	
Date/Time CV Reported Tue, 02/10/2015 12:06 AM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Tue, 02/17/2015 1:28 PM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Witness(es)	Home Address
§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM Michael Martinez	02150	942136	033 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Steve Tirado	22659	900684	033 PCT
2. POM Elvin Gomez	09911	938582	033 PCT
3. POM Eddy Gutierrez	12755	925406	033 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Michael Martinez	Discourtesy: PO Michael Martinez spoke rudely to § 87(2)(b)	§ 87(2)(b)
B.POM Michael Martinez	Force: PO Michael Martinez used a chokehold against § 87(2)(b)	§ 87(2)(b)
C.POM Michael Martinez	Force: PO Michael Martinez restricted the breathing of § 87(2)(b)	§ 87(2)(b)
D.POM Michael Martinez	Abuse: PO Michael Martinez threatened to arrest § 87(2)(b)	§ 87(2)(b)
§ 87(2)(g), § 87(4-b)	§ 87(2)(b)	§ 87(2)(b)

Case Summary

On February 9, 2015, at approximately 9:35 p.m., PO Michael Martinez, PO Elvin Gomez, PO Eddy Gutierrez, and PO Steve Tirado of the 33rd Precinct responded to the § 87(2)(b). There were multiple incidents occurring inside the shelter at the time, and numerous security guards and hospital police officers from § 87(2)(b) also responded. The hospital guards and officers became involved in a violent struggle with a shelter resident in the area just before the shelter's metal detector and X-ray scanner. Another shelter resident, § 87(2)(b) approached the scene and attempted to document it with his cellphone camera. PO Martinez instructed § 87(2)(b) to move away from the scene and the two exchanged words. § 87(2)(b) told PO Martinez that his sister was a police officer and PO Martinez allegedly replied, "Fuck your sister" (**Allegation A**). § 87(2)(b) retreated to the other side of the X-ray scanner but continued to speak to PO Martinez. PO Martinez approached § 87(2)(b) and allegedly grabbed his throat, which restricted his breathing (**Allegations B and C**). PO Martinez also threatened to arrest § 87(2)(b) (**Allegation D**). § 87(2)(b) was not arrested or summonsed. § 87(2)(g), § 87(4-b) The entire incident was captured by multiple surveillance cameras inside the shelter (BR01; BR02).

On March 5, 2015, this case was reassigned to Inv. Giansante after Inv. Bongiovanni left the CCRB.

Mediation, Civil and Criminal Histories

- This complaint was unsuitable for mediation because § 87(2)(b) stated that he intended to file a lawsuit.
- On June 8, 2015, the NYC Comptroller's office confirmed that § 87(2)(b) has not filed a Notice of Claim regarding the incident (BR03).

• [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Civilian and Officer CCRB Histories

- This is § 87(2)(b)'s first CCRB complaint (BR05).
- PO Martinez has been a member of the NYPD for nine years and has had 20 previous CCRB allegations involving six cases with no substantiated allegations (see officer history).

Potential Issues

- § 87(2)(b) reported that he experienced throat pain after the incident, and that he was transported by ambulance to § 87(2)(g) and was prescribed pain relievers. However, the investigation was unable to obtain § 87(2)(b)'s medical records. He refused to sign HIPAA forms at his interview at the CCRB, and he failed to appear for four subsequent appointments to sign HIPAA forms.
- When § 87(2)(b) appeared at the CCRB to provide a sworn statement, he told Inv. Bongiovanni that he was under the influence of "strong" medication he took for seizures and depression. At various times during the interview, § 87(2)(b) apologized for

raising his voice and blamed his behavior on his medication. He also stated multiple times that his medication was “kicking in.” At one point he dozed off and had to be roused.

Findings and Recommendations

Explanation of Subject Officer Identification

- PO Martinez admitted to using profanity with § 87(2)(b) engaging him physically, and threatening to arrest him. He also identified himself on video footage. § 87(2)(g)

Allegations not pleaded

- § 87(2)(g)

Recommendations

- **Allegation A—Abuse of Authority: PO Michael Martinez spoke rudely to** § 87(2)(b)

It is undisputed that PO Martinez used profanity when speaking to § 87(2)(b). § 87(2)(b) did not make any allegation of discourtesy when he initially called 911 (BR06). In his IAB intake phone call, he alleged that he told PO Martinez that his sister was a lieutenant in the NYPD and that PO Martinez replied, “Fuck your sister” (BR07). § 87(2)(b) repeated the allegation in his phone statement to the CCRB and in his CCRB in-person interview (BR08; BR09). He further elaborated that he approached the metal detector and attempted to photograph the ongoing physical struggle involving the hospital security guards. PO Martinez told § 87(2)(b) to move back and pushed him back by putting a hand on his chest. § 87(2)(b) told PO Martinez that he had already backed up and was not in the way. § 87(2)(b) also told § 87(2)(b) to move back. § 87(2)(b) moved around the detector and told PO Martinez that officers should be intervening in the physical struggle. At this point he told PO Martinez about his sister and that he was going to report the incident to her. PO Martinez then allegedly said, “Fuck your sister,” and § 87(2)(b) replied, “Fuck you.”

§ 87(2)(b) made no mention of officers using profanity in the statement he wrote the night of the incident (BR10). He recounted in his CCRB phone statement that he recalled § 87(2)(b) arguing with an officer, but that he could not recall what they said to each other (BR11). He did not recall hearing the officer use profanity.

Footage from camera #2 shows PO Martinez’s interaction with § 87(2)(b) (BR01; BR02). As described in the detailed IA, PO Martinez follows hospital guards through the metal detector archway when the physical struggle begins. § 87(2)(b) comes through the archway shortly after him and stands in the area before the detector watching the fight. A few seconds later, PO Martinez puts his hand on § 87(2)(b)’s chest and pushes him back toward the double doors to the left of the detector and X-ray scanner. § 87(2)(b) backs up but appears to speak briefly to PO Martinez. A few seconds later, PO Martinez turns back to § 87(2)(b) puts his hand on his shoulder and chest, and guides him back through the doors. After 35 seconds, § 87(2)(b) comes from the other side of the detector and enters the archway behind PO Gutierrez. PO Martinez notices § 87(2)(b) and can be heard telling him to “get back.” § 87(2)(b)

immediately complies by backing out of the archway and returning to the other side of the X-ray scanner. PO Martinez turns away from him and stops speaking to him. After a few seconds, PO Martinez turns back to look at § 87(2)(b) who is still standing on the other side of the X-ray scanner, and the two appear to exchange words. Within three seconds, PO Martinez goes through the detector archway to physically engage § 87(2)(b). Although the surveillance camera also recorded audio, the noise created by the chaotic melee in the shelter makes it impossible to hear § 87(2)(b) and PO Martinez's conversation.

PO Martinez admitted that he used profanity with § 87(2)(b) (BR12). He recounted that he saw § 87(2)(b) approach the scene with his cellphone out, and that § 87(2)(b) came up behind PO Gutierrez in the area near the metal detector. PO Martinez was concerned by § 87(2)(b)'s proximity to PO Gutierrez's gun and he instructed § 87(2)(b) to move back. § 87(2)(b) verbally refused but PO Martinez could not recall what § 87(2)(b) said. PO Martinez repeated the instruction in a more authoritative manner, and used profanity when he did so. PO Martinez guessed that he used "the F-word" but could not recall what he said to § 87(2)(b). He admitted that he used profanity more than once. He used profanity to get § 87(2)(b)'s attention and to make him comply and move back. PO Martinez explained, "I was speaking to him as a gentleman and he didn't understand that, so I had to raise up the level of authority." PO Martinez's use of profanity was effective in that it prompted § 87(2)(b) to move to the other side of the metal detector and X-ray scanner. The investigator specifically asked PO Martinez if he said, "Fuck your sister." PO Martinez could not recall if he did so. PO Martinez recounted that § 87(2)(b) continued to yell from the other side of the X-ray scanner, and that he instructed § 87(2)(b) to stop yelling more than ten times before going through the detector archway to engage him physically.

PO Gutierrez, PO Gomez, and PO Tirado all denied hearing any officer say, "Fuck your sister," to any civilian on scene (BR13; BR14; BR15)

The video footage shows that PO Martinez initially had to instruct § 87(2)(b) to move away from the scene multiple times and that he eventually touched § 87(2)(b) to guide him through the double doors. However, PO Martinez did not recount this portion of the incident and only recalled that it took place after he viewed the video footage. In fact, PO Martinez specifically claimed that he used profanity with § 87(2)(b) in order to gain compliance after § 87(2)(b) refused to back away from PO Gutierrez. The video § 87(2)(g) shows that § 87(2)(b) moved away from PO Gutierrez immediately after PO Martinez instructed him to do so. § 87(2)(g)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

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§ 87(2)(b)

Patrol Guide Procedure 203-09 requires officers to be courteous and respectful when interacting with the public (BR16). As such, the Department generally does not condone the use of profanity by officers when addressing the public. However, there are instances in which the use of profanity is not considered actionable misconduct, such as when profanity is employed in lieu of physical force in order to gain cooperation with a verbal command. This is in contrast to a

situation in which profanity is used in a gratuitous disrespectful remark. PD v. White, OATH Index #78667/03 (2004) (BR17).

§ 87(2)(g)

- **Allegation B—Force: PO Michael Martinez used a chokehold against § 87(2)(b)**
Allegation C—Force: PO Michael Martinez restricted the breathing of § 87(2)(b)

In his 911 call, § 87(2)(b) alleged that PO Martinez choked his neck and also “choke-slammed” him, and that his throat hurt and he was having difficulty swallowing. He reiterated the allegation in his IAB intake call. In his CCRB phone statement, he alleged that PO Martinez grabbed him around his neck and pushed him against a wall, that PO Martinez had his hands on his neck for approximately five minutes, and that his breathing was “a little bit” restricted. In his in-person interview, he reiterated that PO Martinez grabbed his neck and choked him and that his breathing was “a little bit” restricted. However, he could not say for how long PO Martinez held his neck, and stated that at some point PO Martinez released his neck and grabbed his shirt collar. § 87(2)(b) did not have any visible injuries. He claimed to have experienced throat pain and to have been examined and treated at a hospital, but he refused to sign HIPAA forms. As a result, the investigation could not independently verify his claims regarding the medical treatment he received or obtain any documentation regarding any injury he may have sustained.

§ 87(2)(b) made no mention of PO Martinez grabbing § 87(2)(b)'s throat or neck in his written statement. In his phone statement, he denied seeing PO Martinez make physical contact with § 87(2)(b) and denied seeing him grab § 87(2)(b)'s neck. § 87(2)(b) denied that § 87(2)(b) ever complained to him that an officer had choked him, that his throat hurt, or that he could not breathe, and said that such a complaint would have required him to call an ambulance for § 87(2)(b). The shelter's logbook entry documenting the incident states only that § 87(2)(b) was “restrained” by NYPD (BR18).

The video footage of the incident from camera #3 shows PO Martinez approaching § 87(2)(b) reaching out and grabbing hold of him, and eventually bringing him to stand against a wall (BR01; BR02). It is impossible to determine from the footage whether PO Martinez's hand ever made contact with § 87(2)(b)'s neck or throat. Once § 87(2)(b) is backed up against a wall, it appears that PO Martinez is no longer making physical contact with him.

PO Martinez admitted to approaching § 87(2)(b) and grabbing his shirt at his collarbone. He denied that he grabbed § 87(2)(b)'s throat or that he ever had his hand around § 87(2)(b)'s neck. PO Gutierrez, PO Gomez, and PO Tirado all denied seeing any officer grab § 87(2)(b)'s neck. PO Gutierrez viewed video footage of the incident and stated that he had no

recollection of seeing the moment when PO Martinez made physical contact with § 87(2)(b) PO Gomez video footage and stated that he did not recall seeing PO Martinez make contact with § 87(2)(b). He also did not recall following PO Martinez and standing with him and § 87(2)(b) near a wall. PO Tirado also did not recall seeing the physical interaction between PO Martinez and § 87(2)(b) shown in the footage.

§ 87(2)(g)

- **Allegation D—Abuse of Authority: PO Michael Martinez threatened to arrest** § 87(2)(b)

§ 87(2)(b)

It is undisputed that PO Martinez threatened to arrest § 87(2)(b). § 87(2)(b) did not allege that PO Martinez threatened to arrest him. However, § 87(2)(b) reported in his contemporaneous written statement and in his telephone statement to the CCRB that PO Martinez told § 87(2)(b) he was going to arrest him for interfering with officers. The shelter logbook entry states that § 87(2)(b) “started to interfere with NYPD as they attempted to defuse the situation,” but does not recount an officer threatening to arrest him.

PO Martinez recounted that § 87(2)(b) retreated to the other side of the X-ray scanner but continued to yell at both PO Martinez and the crowd of bystanders. PO Martinez could not recall what § 87(2)(b) said but knew he used profanity and believed he yelled, “This is bullshit!” § 87(2)(b) s yelling drew additional shelter residents from their rooms and that it caused this crowd on the other side of the metal detector to become more agitated and aggressive. He saw crowd members ball their fists, shrug their shoulders, and walked toward the metal detector, which led him to believe they might become violent. PO Martinez said the area was “very loud” at the time and that the hospital security guards engaged in a violent struggle were also yelling. However, he insisted that § 87(2)(b) s yelling, and not the noise of the struggle drew the crowd members and caused them to become aggressive. He explained that the crowd members on § 87(2)(b) s side of the metal detector could not see the struggle and could not hear it as well as they could hear § 87(2)(b). PO Martinez claimed to have instructed § 87(2)(b) to stop yelling more than ten times. No other NYPD officer spoke to § 87(2)(b) or engaged physically with him during this time. PO Martinez felt he had to stop § 87(2)(b) s yelling, so he grabbed him and told him he would arrest him if he did not stop.

PO Martinez claimed that he would have arrested § 87(2)(b) for obstructing governmental administration. When asked to explain how § 87(2)(b) had committed OGA, PO Martinez said, “His actions and his loud tone of voice were distracting other people, you know the other officers, from taking care of what they had to take care of. It’s a distraction, so it’s a safety issue also.” The investigator asked him to state specifically what § 87(2)(b) s yelling distracted NYPD officers from doing and he said, “When he yells out and he’s arguing, they have to turn around and look at him. So they’re taking their eye off of what’s actually going on on the ground.” PO Martinez added that he observed PO Gutierrez and PO Tirado have to direct their attention

toward § 87(2)(b) The investigator asked PO Martinez to state the specific instances when this happened and he said that PO Gutierrez had to turn around when he realized § 87(2)(b)'s close proximity to him. PO Martinez confirmed that this was also the only time that § 87(2)(b) did something physical to distract an officer. He also admitted that PO Tirado only had to turn around after he had already grabbed § 87(2)(b)

PO Gutierrez recounted that he performed crowd control to deal with the shelter residents drawn to the scene by the commotion of the physical altercation involving hospital guards. However, he said none of the crowd members was particularly disruptive, and he did not specifically recall § 87(2)(b)'s presence. PO Gomez did not have any recollection of § 87(2)(b)'s presence or of being distracted by § 87(2)(b) PO Tirado recounted that he remained on the opposite side of the metal detector from the physical struggle and that he had no recollection of § 87(2)(b)

As previously discussed, the video footage from camera #2 shows that fewer than ten seconds elapsed between § 87(2)(b)'s retreat to the other side of the X-ray scanner and PO Martinez's physical engagement with him (BR01; BR02). It also confirms that the melee caused a great deal of noise, and that bystanders were drawn by the fight itself. Footage from camera #3 shows the area behind § 87(2)(b) It shows no evidence that a crowd was drawn by § 87(2)(b)'s yelling (BR01; BR02). In fact, the crowd on § 87(2)(b)'s side of the metal detector only grows and becomes more aggressive after PO Martinez comes through the metal detector and creates a physical altercation.

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs, or perverts the administration of law...by means of intimidation, physical force, or interference, or by means of any independently unlawful act. Penal Law § 195.05 (BR19). A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof: 1.) He engages in fighting or in violent, tumultuous behavior; or 2.) He makes unreasonable noise; or 3.) In a public place, he uses abusive language or obscene language, or makes an obscene gesture; or 4.) Without lawful authority, he disturbs any lawful assembly or meeting of persons; or 5.) He obstructs vehicular or pedestrian traffic; or 6.) He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or 7.) He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose. Penal Law § 240.20 (BR20). The mere expression that one feels aggrieved by the police—even when uttered in a loud voice—cannot constitute an offense. People v. Square, 20 Misc.3d 1126A (N.Y. Cty. Crim. Ct. 2008) (BR21).

§ 87(2)(g)

§ 87(2)(g)

- § 87(4-b) § 87(2)(g)

Pod: 2

Investigator: _____ Daniel Giansante _____
Signature Print Date

Pod Leader: _____
Title/Signature Print Date

Attorney: _____
Title/Signature Print Date